which in the opinion of the learned President was the correct sentence on this charge. The appellant argued that, in all the circumstances, even this sentence was excessive. The appellant did not have the assistance of Counsel but I understood his main argument to be that one of the matters which the learned President had not taken into consideration at all was the appellant's intention of making restitution to the persons whom he had cheated. He also pointed out that there was a slight conflict between the facts as stated by the Police after his plea of guilty and his own version of what had happened. On page 8 of the record the following passage appears in the statement made by the prosecution :—

"Accused was asked for his address and where he worked; he gave the address on these bills, Ex. P. 5."

In his own statement to the Court, however, the accused said that at Pritchards he was asked to put his name and address on the paper, but was not asked for his employment.

I did not think there was much substance in the latter point, because later in the case the appellant admitted that he had omitted to tell the Manager that he had no employment, knowing that he would not have got credit had he done so; but it appeared to me that the learned President did not perhaps pay as much attention as he might have done to the arrangements the accused had made for repaying the amounts of the credits obtained by him. I thought it was probably true, as the appellant suggested, that, being unrepresented, he did not put this point as strongly as he might have done before the Court and that it was to some extent overlooked.

There is another point bearing upon the question of sentence in this case. In *Rex v. Nadaison*[3] Terrell, J., expressed the view that in section 420 of the Penal Code "property" should be regarded as *ejusdem generis* with "valuable security" and that in any case section 420 should be reserved for serious cases only and that normally these offences should be charged under section 415, punishable under section 417. With this view I respectfully agree. Under section 417 the maximum punishment is one year whereas under section 420 it is seven years. Had the appellant in this case been charged under sections 415 and 417 it is quite possible that the learned President might have assessed the punishment on a lower standard altogether.

I did not think it could be suggested that a sentence of three months' rigorous imprisonment was in itself either illegal or excessive, but I thought it possible that had the question of restitution been brought more clearly before the mind of the learned President and had the charge been under section 417 he might have made the sentences on the two charges concurrent instead of consecutive. For these reasons I gave the appellant the benefit of this doubt and amended the sentence imposed by the learned President to one of three months' rigorous imprisonment to run concurrently with the one month's rigorous imprisonment imposed in respect of the first charge.

Order accordingly.

THE FIRESTONE TIRE & RUBBER CO. (S.S.) LTD. v. SINGAPORE HARBOUR BOARD.

[Privy Council (Lord Normand, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen)
June 10, 1952]

[Privy Council Appeal No. 8 of 1951]

Public Authorities Protection — Limitation of action — Singapore Harbour Board acting as Warehousemen — Short delivery from godown — Acting for benefit of public within statutory powers — Public Authorities Protection Ordinance (Cap. 14) as amended by Ordinance No. 19 of 1939, s. 2(1)(2) — Singapore Ports Ordinance (Cap. 149).

This was an appeal to the Judicial Committee of the Privy Council from an order of the Court of Appeal of Singapore (Murray Aynsley, C.J., and Gordon-Smith, J., Evans, J. dissenting), reported (1950) M.L.J. 131, allowing the appeal of the Singapore Harbour Board against the judgment of Brown, J., reported in (1950) M.L.J. 47.

The appellants claimed damages for breach of contract of bailment. They said that they were the consignees of a cargo of 3960 loose rubber tyres which arrived in Singapore on the 4th day of July 1946 from Bombay. They alleged that the respondent Board received the full number of tyres into their godown but delivered to the appellants 17 tyres short. The appellants on the 1st August 1946 notified the respondent Board of the loss of 17 tyres and on the 19th June 1948 the Writ was issued.

The respondent Board who are a statutory body incorporated by the Ports Ordinance (Cap. 149) contended that under the Ordinance they have powers to manage the Singapore harbour and carry on the business of warehousemen and as the action against them was for an act done in pursuance of the Ports Ordinance and it was not maintainable because it was not commenced within six months after the alleged act, neglect or default complaint of as required by section 2 of the Public Authorities Protection Ordinance. Brown, J., held that the respondent Board had not discharged their burden of proving that the loss of the tyres was not due to any fault of theirs and the respondent Board could not claim the protection of the Public Authorities Protection Ordinance as they were dealing with the appellants as individuals in the course of an implied contract, which was an incident in carrying on their business as warehousemen. The Court of Appeal in allowing the appeal held that the Board were directly performing their duties as dock owners under the Ports Ordinance and were entitled to protection under the Public Authorities Protection Ordinance.

The appellants appealed.

Held, that the Board had, under the powers conferred on them, elected to carry on the activities of wharfingers and warehousemen themselves; such activities were essential to the proper running of the port for which they were responsible, and so constituted one of the main purposes for which they had received their powers. The Board were, accordingly, entitled to the protection of the Ordinance.

Cases referred to :—

(1) *Bradford Corporation v. Myers* (1916) 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121.

(2) *Griffiths v. Smith* (1941) A.C. 170; (1941) 1 All E.R. 66; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63.

PRIVY COUNCIL APPEAL, appeal from the judgment of the Court of Appeal, Singapore, reported in (1950) M.L.J. 131.

W. Raeburn, Q.C., and *R. Withers-Payne* for the for the appellants.

K. Diplock, Q.C., and *J. F. Donaldson* for the respondent Board.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by :—

Lord Tucker : —On 9th December, 1949, Mr. Justice Brown, sitting in the High Court of the Colony of Singapore gave judgment for $2,053.10 in favour of the appellants who were the plaintiffs in an action brought by them against the respondent Board claiming damages for the loss of 17 tyres, the property of the plaintiffs, which had been received by the Board in one of their godowns in the harbour of Singapore but never delivered to the plaintiffs. On appeal by the respondent Board to the Court of Appeal for the Colony the judgment of the trial Judge was (by a majority) reversed and judgment entered for the respondent Board on the ground that the action was barred by section 2(2) of the Public Authorities Protection Ordinance of the Straits Settlements, not having been commenced within six months next after the act, neglect or default complained of. This plea had been rejected by the trial Judge. The plaintiffs-appellants appealed to Her Majesty in Council by leave of the Court of Appeal. It was common ground that if the Court of Appeal decision with regard to the Public Authorities Protection Ordinance was correct the appeal must fail, but counsel for the respondent Board was desirous of arguing, should it become necessary so to do, that the Board were in certain events entitled to succeed on other grounds. The only issue, however, debated before their Lordships was the applicability of the Ordinance.

The parties are hereinafter referred to as "the appellants" and "the Board". The material facts which are not now in dispute are as follows :—

(1) On or about 25th June, 1946, the Firestone Tire Co. of India Ltd. (hereinafter referred to as "the consignors") consigned a cargo of 3,960 rubber tyres and 33 cases of rubber tubes to the appellants in Singapore from Bombay per s.s. "Samokla" on the terms of a Bill of Lading dated in Bombay 18th June, 1946, between the consignors and the P. and O. Steam Navigation Company. A copy of the Bill of Lading was sent on 25th June, 1946, to the appellants by the consignors. By the Bill of Lading the goods were shipped to consignors' order with an option to the shipping company (the P. and O.) to deliver "either over the ship's side or from lighter or store ship or hulk or Custom House or warehouse or dock or wharf or quay at consignees' risk". It also provided that the Bill should be surrendered duly endorsed at port of destination in exchange for delivery order.

(2) On or about 28th June, 1946, Islay Kerr & Co., Ltd. of Singapore as agents for the shipping company (P. and O.) supplied to the appellants a Delivery Order dated 28th June, 1946, addressed to the Board requesting them to deliver the cargo to the appellants.

(3) On or about 4th July, 1946, the Delivery Order was sent by the appellants to the Board.

(4) On 4th July, 1946, the s.s. "Samokla" arrived in Singapore and berthed at godowns Nos. 1 and 2.

(5) On 11th, 12th, 13th and 14th July, 1946, the cargo was discharged from the s.s. "Samokla" by the servants of the Board and was received by the Board in one of their godowns.

(6) On or about the dates aforesaid the cargo was delivered out of the Board's godown to the appellants or to their order with the exception of the 17 tyres in respect of which the action was brought which were never delivered. Loss of the goods was reported to the Board's clerk on duty at the godown at the time and formal notification in writing given on 1st August, 1946.

(7) The writ in the present action was issued on 19th June, 1948.

These being the facts the Board failed to discharge the onus that lay on them as bailees to prove that the goods were lost without negligence on their part and apart from the Public Authorities Protection Ordinance were accordingly liable to the appellants unless they could rely on some contractual protection and it was on this aspect of the case that counsel for the Board desired to reserve his right of further argument. For present purposes it is assumed that but for the Ordinance the appellants would be entitled to hold the judgment of the trial Judge in their favour.

The material provisions of section 2 of the Public Authorities Protection Ordinance are as follows :—

2.—(1) "Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution, or intended execution of any Ordinance or Rules made thereunder or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, Rules, duty, or authority the following subsections shall have effect.

(2) "The action, prosecution or proceeding shall not lie or be instituted unless it is commenced

within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof."

This language is for all practical purposes identical with the English Public Authorities Protection Act of 1893.

Although the words "Public Authority" do not appear in the section it has long been settled law that the words "any person" must be limited so as to apply only to public authorities or persons acting on behalf of public authorities.

In the present case it has been admitted throughout that the Board is a "public authority" within the meaning of the Ordinance so interpreted. The sole issue accordingly is whether in taking the appellants' goods into their custody for delivery to them they were doing an act "in pursuance of any public duty or authority". In this connection it is also well settled that this question cannot be resolved merely by ascertaining whether the act or activity in question was *intra vires* the authority. The protection of the Ordinance does not cover all the lawful and authorised acts of a public authority. Some acts are excluded. The difficulty is to define what acts or classes of act are excluded. In *Bradford Corporation v. Myers*[1] Lord Buckmaster, L.C., [referring to the Public Authorities Protection Act, 1893, s. 1] said [(1916) 1 A.C. 250]:—

"The difficulty is to draw a line between the class of cases that are within and those that are without the statute, and I am conscious that this opinion does not establish as clear and distinct a line as I should like to see. But the Statute itself is so framed that such distinction is not easy, and there may well be cases about which greater doubt may arise and more uncertainty be felt than about the present, which to my mind lies clearly outside the area of statutory protection."

In the same case Viscount Haldane at page 251 said [*ibid.*, 251]:—

"What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define a priori the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case."

Viscount Dunedin expressed his entire agreement with the speech of Lord Buckmaster and neither Lord Atkinson nor Lord Shaw attempted to enunciate a principle for the construction of the statutory words although Lord Shaw expressed his disapproval of the process of attempting to find an answer by first putting the question. "What is it that this Statute did not mean?"

When the construction of these words again came before the House of Lords in 1941 in the case of *Griffiths v. Smith*[2] the noble Lords who took part in that case again emphasised the difficulty of giving any precise or exhaustive definition and none of them attempted so to do, Lord Porter saying: "I doubt whether it ever will be possible to lay down some general principle by which all cases can be tested".

In this state of affairs it will not perhaps cause surprise if their Lordships do not attempt to accomplish what the noble Lords referred to above found well nigh impossible, but content themselves with examining the two cases cited with a view to extracting therefrom certain matters and considerations that are relevant to, though not necessarily always decisive of, this issue:—

1. It is essential to the protection afforded by the Statute that the act or default in question should be in the discharge of a public duty or the exercise of a public authority. This assumes that there are duties and authorities which are not public. (See per Lord Buckmaster in the **Bradford case**[1] at (1916) 1 A.C. page 247).

2. In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract.

3. The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not of itself deprive the duty or authority of its public quality. The existence or absence of a contract is not a decisive test. (See per Lord Shaw in the **Bradford Corporation case**[1].)

4. Effect must be given to the word "authority". This excludes the test of obligatory as opposed to permissive powers. (See per Viscount Maugham in **Griffiths' case**[2] at (1941) A.C. page 185).

Their Lordships consider that this passage at page 185 in the speech of Viscount Maugham (which speech was expressly approved by Viscount Simon) affords them most assistance in the determination of the present case. He there says: "It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade". The word "incidental" is here used in the sense of "subsidiary". It has in these cases sometimes been used as equivalent to "necessarily incidental to" and was so used by Lord Greene, M.R., in *Griffiths' case*[2] in the Court of Appeal. It will therefore avoid any possible confusion if "subsidiary" is substituted for "incidental" in the passage quoted above. Applying this test to the facts in *Griffiths' case*[2] the noble Lords held that the finding of the trial Judge that the school premises in question where the accident occurred was on the occasion in question being used as a public elementary school, and not for some extraneous purpose, was almost conclusive.

In the present case their Lordships accordingly proceed to consider The Ports Ordinance (Cap. 149) by which the respondent Board was created with a view to determining whether in the light of its provisions and on the facts set out above the Board in taking the appellants' goods into their care and custody in one of their godowns within the precincts of the port of Singapore were in substance acting in the course of exercising for the benefit of the public an authority or power conferred on them by the Ports Ordinance not being a mere subsidiary power.

The heading of the Ordinance reads: — "To Constitute Boards for the Management and Control of the Ports of Singapore and Penang."

Section 2 provides for the transfer of obligations and the benefit of debts due.

Section 4(4) provides that "the duty of carrying out this Ordinance within such limits in the ports and settlements of Singapore and Penang respectively as are duly prescribed shall, subject to such conditions and limitations as are in this Ordinance hereinafter contained, be vested in bodies of commissioners to be called respectively 'The Singapore Harbour Board' and 'The Penang Harbour Board'".

Section 29(3) limits the Board's power of leasing to three years unless the written sanction of the Governor is obtained.

Section 46 imposes an obligation on the Board to frame a scale of rates for, *inter alia*, "the landing, shipping, wharfage, cranage, storage or demurrage of goods at any wharf, dock, pier, building or other place in the possession of the Board" and gives power to the Board to levy any such rates. It is to be observed that with regard to the matters specifically dealt with in this section the Board are given no power to enter into special agreements instead of charging in accordance with the scale of rates framed by them. This is in contrast with section 47(2) which confers such a power with regard to charges for the use of docks and the other matters there referred to.

Section 60(1) enacts that provision shall be made for the due fulfilment of the Board's liabilities "and for the efficient administration of the property vested in it under this Ordinance".

Section 62 provides for the recovery of leviable rates and gives a right to seize and detain goods until the rates due in respect thereof are paid.

Section 73 is headed "Works and Duties". It enacts that "The Board may" do the various things enumerated in paragraphs lettered *(a)* to *(q)*. The section is clearly designed to give wide powers to the Board so as to cover every activity which could be foreseen and avoid any question of some act being held to be *ultra vires*. It includes some matters such as the construction, maintenance and repair of docks and wharves which are of the very essence of the undertaking and other matters some of which might be considered purely subsidiary and others to be on the border line. The paragraph which is most relevant for present purposes is *(c)* which reads as follows :—

> "Carry on the business of builders and repairers of ships and machinery, of wharfingers and warehousemen, of dealers in coal and other kinds of fuel, and dealers in stores connected with or required in the above-named business."

Paragraph *(p)* permits them to "be insurers of goods in the custody of the Board". This, however, does not mean, as seems to have been thought by some, that it gives power to take out a policy of insurance in respect of goods in their custody, but that they may take upon themselves the liability of insurers of such goods.

Sections 74 and 75 deal with the regulation of the use of wharves and read as follows :—

> 74. (1) "The Governor may, notwithstanding anything in this Ordinance, appoint any part of the wharves or premises vested in the Board as a place for the collection of import or other revenue duties payable to the Government."
>
> (2) "Whenever any wharf or part of the premises of the Board has been so appointed as a place for the collection of import or other revenue duties, the Board shall set apart and maintain such place, in such manner as the Governor requires, for the use of the persons entitled to collect such duties.
>
> (3) "All rates payable in respect of any such wharf or part of the premises so set apart, or for the landing, shipping or storage of goods thereon, therefrom or therein, shall be paid to Board."
>
> 75. "The Board shall provide such number of public landing-places as are, in the opinion of the Governor, sufficient, from and at which the public shall be permitted to embark and land, free of charge, and may, with the sanction of the Governor, vary the same."

Section 75 is, apart from the section which imposes a duty to frame a scale of rates, the only section which is in express terms obligatory, but when read in conjunction with the previous section it is clear that the emphasis is on the duty to make available a sufficient number of free landing-places from the number of existing landing-places rather than to construct special landing-places for this purpose.

Section 76 gives the Board power to make by-laws for *inter alia, (c)* "the safe and convenient use of the docks, wharves, piers, landing-places, warehouses, sheds and premises vested in the Board or under its control and of any ferry service maintained by the Board" and *(d)* "regulating the reception, storage and removal of goods within and from the premises of the Board. . . ."

Section 78 imposes penalties for the infringement of by-laws.

The Board having constructed or become possessed of warehouses which must be regarded as a normal and necessary adjunct to a port such as Singapore could elect whether to let them out to others for periods less than 3 years (or with consent of the Governor for longer periods) or themselves to operate them as wharfingers and warehousemen and levy rates for the wharfage or storage of goods therein. Having chosen the latter alternative they did not thereby cease to function as a Harbour Board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping community in one of the ways authorised by the Ordinance by which they were created a Harbour Board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers.

Counsel for the appellants stressed the fact that in so doing they were in the words of Viscount Maugham "acting under a power to carry on a trade" and he further argued that in so doing they entered into a contractual relationship both with the appellants and the shipping company, or alternatively only with the shipping company, and that the existence of this contractual relationship which gave rise to the liability of the Board arose out of a private trading transaction.

It would, however, be putting much too narrow a construction on Viscount Maugham's language to interpret it as meaning that every act done under a power to trade must always be a mere subsidiary power. He was doing no more than give an instance of a subsidiary power having in mind, no doubt, the facts in the *Bradford Corporation case*[1]. Furthermore as previously stated the existence or non-existence of a contract is not a decisive test and on the facts in the present case their Lordships are clearly of opinion that the question of contract is immaterial to their decision since, on any view, the Board were exercising their permissive powers to perform a normal function of a Harbour Board and in so doing were providing a service essential to the shipping and commercial community of Singapore and accordingly entitled to the protection of the Public Authorities Protection Ordinance.

In the result their Lordships feel no difficulty in deciding on which side of the line this case lies and are in agreement with the conclusion reached by the majority of the Court of Appeal. Mr. Justice Evans in his dissenting judgment held that there was no public duty on the Board to run a warehousing business. He says the public had not been consulted and might have preferred to deal with private traders, and after quoting Viscount Maugham he finds that the Board is carrying on a trade and there was no evidence that it was acting for the public benefit. From what has been already stated it will be seen that this view does not give sufficient weight to the word "authority" as distinct from "duty" and would appear to lay more emphasis on the words "such as a power to carry on a trade" than was intended in the context in which they were used.

In agreeing, however, with the conclusion reached by the majority their Lordships think it right to observe that they are not able to accept the test laid down by the Chief Justice in that portion of his judgment where in dealing with the interpretation of the decision in the *Bradford case*[1] he says: "The Corporation was obliged to supply gas and authorised to sell coke. This distinction was stressed in the judgments of the House and this stress caused the actual decision to be misunderstood. In view of later cases it must be taken to be limited to cases in which there is a contract and either a breach of contract or a tort arising out of the performance of that contract. When there is no contract there is no distinction between activities which are obligatory and those which are merely permissive".

For the reasons stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

Appeal dismissed.

K. E. MOHAMED IBRAHIM v. M. MOHAMED IBRAHIM.

[Orig. Civ. Juris. (Buhagiar, J.) June 14, 1952]

[Selangor — Civil Suit No. 262 of 1951]

Trade Marks — Interim injunction — Application for — Balance of convenience.

The plaintiff and the defendant are both manufacturers of hair oil; the plaintiff trading as Zam Zam Chemical Works and the defendant as Ramzan Chemical Works. The plaintiff is the registered proprietor of a trade mark consisting of the words "Zam Zam" and of certain devices; he sells the hair oil manufactured by him in boxes or cartons coloured green, pink and blue. Some time ago the plaintiff discovered that the defendant was selling hair oil not manufactured by the plaintiff bearing a trade mark consisting of the word "Ramzan" and got up in a manner which, the plaintiff contended, was a colourable imitation of his trade mark.